

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EMILY ROBINSON, a minor child by	:	CIVIL ACTION
and through her parents MICHAEL AND	:	
DANA ROBINSON, <u>et al.</u>	:	NO. 05-1988
	:	
v.	:	
	:	
COUNCIL ROCK SCHOOL DISTRICT	:	

MEMORANDUM AND ORDER

Kauffman, J.

July 12, 2006

Plaintiffs Michael Robinson and Dana Robinson (together “Parents” or “the Robinsons”) bring this action on behalf of their daughter Emily Robinson (“Emily”) under the Individuals with Disabilities Education Act (“IDEA” or “the Act”), 20 U.S.C. § 1400, et seq. They contend that Defendant Council Rock School District (“the School District”) failed to provide Emily with a “free appropriate public education” as required under the Act and seek reimbursement for Emily’s tuition at a private school. Now before the Court are the parties’ cross motions for judgment on the administrative record. For the reasons that follow, the School District’s Motion will be granted and Plaintiffs’ Motion will be denied.

I. STATUTORY FRAMEWORK

The IDEA requires states receiving federal education funding to provide a “free appropriate public education” (“FAPE”) to all children with disabilities. 20 U.S.C. § 1412(a)(1). Once a child is identified as having a disability, the IDEA requires the school district to develop an Individualized Education Program (“IEP”). An IEP is “a written statement developed for each child that must include ... the child’s current level of performance, and how her disability affects her performance.” S.H. v. State-Operated School District of the City of Newark, 336 F.3d 260, 264 (3d Cir. 2003). It must also “detail those special education services and supplementary aids that the school will provide, explain how they will contribute toward meeting the annual goals, how they will allow the child to progress in both the general curriculum and participate in

extracurricular activities, and describe how the child will interact with disabled and non disabled children.” Id.

The Act also specifies how the IEP is to be developed: “An IEP team meets and writes the IEP considering the strengths of the child, the concerns of the parent, and the most recent evaluation of the child.” Id. The IEP team must include the child’s parents, at least one special education teacher of the child, a representative of the local educational agency who is qualified to design a course of instruction for the disabled child, and “at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child[.]” 20 U.S.C. § 1414(d)(1)(B).

Parents who disagree with an IEP are entitled to “an impartial due process hearing[.]” 20 U.S.C. 1415(f). “Any party aggrieved by the findings and decision” rendered in the due process hearing may “appeal such findings and decision to the State educational agency.” Id. at § 1415(g). A party wishing to appeal that decision may “bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States[.]” Id. at § 1415(i)(2).

II. BACKGROUND

Emily lives with her parents and older brother in the Council Rock School District. In September 2000, she entered Kindergarten at Goodnoe Elementary School (“Goodnoe”). During her Kindergarten year, Emily made satisfactory academic progress and her teacher regarded her as a “sweet little girl, very pleasant, eager to learn.” Hearing Tr. at 69-72. At the beginning of her first grade year, Emily took a standard test that was designed to assess her literacy skills. Id. at 227-28. She performed “well above the normal range,” leading the literacy specialist at Goodnoe to conclude that she was “on track” and that she was “ready for reading instruction in the classroom.” Id. at 231-234. From the school’s perspective, Emily continued to thrive both academically and socially throughout her first grade year. Id. at 77, 227-28. Her mother, however, had concerns about her reading progress. Id. at 725.

At the end of her first grade year, Emily was administered another reading assessment. She scored at slightly below the expected level. Her score was H, when the norm for students at

the end of the first grade was I. Id. at 77. Though Emily's score did not indicate a significant lack of progress, the principal at Goodnoe, Eileen Dwell, decided to place her in an inclusion classroom in the second grade, where she would receive more individual attention. Id. at 84-85.

Two teachers were assigned to Emily's second grade inclusion class, both of whom are certified in regular and special education. Id. at 331, 446. One is also certified as a reading specialist. Id. at 336. In order to address the slight reading deficiency identified at the end of her First Grade year, Emily was placed in a guided reading group that met five times a week.¹ Id. at 87.

As a matter of course, Goodnoe administers another reading assessment test to all second graders early in the year. Emily's scores indicated that her reading skills were proficient and at grade level. Id. at 252-53; 345. Her writing skills, however, tested below grade level. The test evaluated Emily's writing in five areas: focus, content, organization, style, and conventions. Id. at 254. Emily scored at the "basic" level in all areas but "conventions," where her score was "below basic."² Id. at 256; 347-48.

The teachers' observations in the classroom were consistent with the test scores: it was apparent to both that Emily was struggling with her writing. Id. at 346, 461. In November, the

¹ Patricia Berg, the reading specialist at Goodnoe, explained that guided reading is "a structure where we can observe the use of strategies and which strategies [the students] are using while they read, and therefore seize a teachable moment and offer them suggestions for other strategies they might try ... [In a general session,] you'd see six children come in and sit down. And I would have a book and I would give a brief book introduction. Then I would ask them to – give them a purpose for reading. Together, we would make some predictions ... and then they would read the book silently.

"While they're reading silently ... I can walk around behind them and tap them on the shoulder ... Then they whisper read. They read it aloud to me, a portion of the text. And while they're doing that, I take a running record, which I can then analyze to see what they're doing when they're reading. And based on that I might pick a teaching point for afterwards ... At the end, when they're all finished reading ... we discuss the story and check the comprehension." Hearing Tr. at 238-40.

² A score of "proficient" indicates skills at grade level. A score of "basic" is one level below "proficient."

teachers expressed their concerns regarding Emily's writing at parent-teacher conferences. Id. at 370; 460; 745. It was agreed that both teachers and parents would observe Emily closely, and that, if necessary, she would be referred to an Instructional Support Team ("IST"). The IST referral occurred approximately one month later in December 2002. Id. at 371, 462. In January 2003, the IST team met and developed an intervention plan, which among other things, provided that Emily would work on word families within her guided reading group and that her teachers would concentrate on teaching her spelling patterns. Id. at 466; see also School District Exh. 2.

While the IST team was developing its intervention plan, the Robinsons decided to have Emily undergo a formal psychological evaluation. Hearing Tr. at 748-49. They hired Dr. Timothy King, an educational psychologist, who completed his evaluation on February 27, 2003 and immediately submitted a Report to the Robinsons. The Report made two diagnoses: Emily had (1) a "Specific Disability in the Realm of Written Expression," which "seems to be related to [a] clinically significant form of Orthographic Dyslexia;"³ and (2) a "mild but significant form of Inattentive Type ADHD." School District Exh. 3 at 12. Significantly, Dr. King did not find a specific learning disability in the area of reading. Hearing Tr. at 915. Indeed, in his Report, he characterized Emily as a "capable reader." School District Exh. 3 at 12.

Dr. King's Report made a number of specific recommendations, including that "Emily should be provided a highly intensive, multi-sensory programmatic intervention for her reading and written expression problems ... While current research does not specify that one particular program is the best, programs such as Orton Gillingham, Wilson Reading Mastery, Lindamood - Bell – have all been found to be successful with this population." Id. at 13.

Based on Dr. King's evaluation, the School District decided to initiate the process that would qualify Emily for special education under the Act. Hearing Tr. at 375. The acting school psychologist, Dr. Madeline Zeisel, drafted an "Evaluation Report," which to a large extent

³ Dr. King defined dyslexia as an impairment in "phonological processing; in other words, the brain's ability to reliably establish sound-symbol associations with automaticity and fluency so that they can be applied in an effortless fashion to the reading process." Hearing Tr. at 811-12.

incorporated Dr. King's findings, and on that basis identified Emily as having a "Specific Learning Disability in the area of Language Arts." See School District Exh. 4. On March 21, 2003, the parents met with Dr. Zeisel, other teachers from Goodnoe, and the Principal to discuss the Evaluation Report Dr. Zeisel had drafted. During the meeting, the Robinsons expressed their belief that Emily needed treatment for her dyslexia. They wanted the School District to administer one of the intensive reading programs Dr. King had recommended, such as the Orton Gillingham method. The Principal explained to the Robinsons that such programs were generally reserved for students with disabilities far more severe than Emily's and, consequently, the School District did not believe such a program was appropriate for Emily at that time. See Hearing Tr. at 103-106; 378-79. Instead, the Principal proposed a "Balanced Literacy" curriculum, which was already in place in Emily's inclusion classroom. The Balanced Literacy program would be supplemented with "individualization around specially designed instruction for writing." Id. at 104.

The parties then began to develop an IEP that would apply for the remainder of Emily's second grade year. A draft was prepared and on April 9, 2003, the IEP team met to consider it. Hearing Tr. at 115, 393, 402, 1030. The IEP proposed two annual goals: (1) "Emily will continue to improve her writing skills in the area of content, focus, organization, and conventions ..." and (2) Emily "will be able to decode unfamiliar words using multiple strategies." See School District Exh. 5. To achieve these goals, the proposal included a number of specific interventions, many of which were drawn from Dr. King's recommendations. Id. The IEP did not, however, adopt Dr. King's recommendation that Emily undergo a systematic and intensive program to treat her dyslexia. Instead, the IEP included a program called "Making Words" to address Emily's phonological processing difficulties. Emily's disability, the School District believed, was not serious enough to warrant the sort of intensive programs Dr. King had advocated. Id.; Hearing Tr. at 396-99.

The Robinsons believed that the proposed IEP failed adequately to address Emily's dyslexia and declined to approve it at the April 9 IEP meeting. Then, on April 23, 2003, they

informed the School District that they would consent to the implementation of the IEP for the remainder of the year, but reserved the right to challenge its appropriateness in a due process hearing. See Hearing Tr. at 115; School District Exh. 7.

At a pre-hearing conference on April 29, 2003, the Robinsons asserted that the proposed IEP was “globally inappropriate” and that Emily should be enrolled at the Cambridge School.⁴ Hearing Tr. at 121-23, 1257; School District Exh. 8. The Robinsons were asked for specific suggestions as to how the IEP might be modified to address their concerns. They responded that Goodnoe was not capable of satisfying Emily’s needs, and that the only way to do so was to place her at the Cambridge School. Id. at 122; 406. Later that day, the parents sent Goodnoe a letter stating their intention to withdraw Emily and enroll her in the Cambridge School. See School District Exh. 13 at 8.

On May 23, 2003, the School District Supervisor of Special Education and others met with the Robinsons to discuss a proposed IEP for Emily’s third grade year (the “May 23 IEP”). Hearing Tr. 145, 421-23. The May 23 IEP differed only “slightly” from the IEP that had been adopted for Emily’s second grade year. Id. at 423. On June 2, 2003, the Robinsons formally rejected the School District’s Notice of Recommended Educational Placement (“NOREP”), which would have implemented the May 23 IEP. They also requested a due process hearing. See School District Exh. 12.

In May 2003, Emily was administered the same standardized assessment of her reading and writing abilities she had taken in the fall. See School District Exh. 21. Her reading scores were above grade-level. Id.; Hearing Tr. at 430. In each of the five evaluation categories for writing, Emily showed improvement over her September scores and in four of those categories, she either exceeded or matched the grade benchmark. School District Exh. 21. The scores appeared on Emily’s final second grade report card. School District Exh. 15.

Despite this apparent progress, the Robinsons enrolled Emily in the Cambridge School

⁴ The Cambridge School is a private institution located in Pennington, New Jersey. Tuition for the 2003 school year was \$23,000. School District Exh. 8.

and sought reimbursement for her tuition in the amount of \$23,000. Hearing Tr. at 1049, 1183. A due process hearing took place and on April 17, 2004, the hearing officer concluded that the School District had provided Emily an appropriate program and placement, and that the parents were not entitled to reimbursement for her tuition at the Cambridge School. See Special Pennsylvania Education Hearing Decision for Emily Robinson (“Hearing Decision”) (Apr. 24, 2004). On June 7, 2004, the Special Education Due Process Appeals Review Panel affirmed. See Appeals Panel Opinion.

On April 27, 2005, the Robinsons filed this action challenging the Review Panel’s decision to deny reimbursement for tuition at the Cambridge School. Both the Robinsons and the School District have now filed motions for judgment based on the Administrative record.

III. STANDARD OF REVIEW

“When deciding an IDEA case, the District Court applies a modified version of de novo review and is required to give due weight to the factual findings of the ALJ.” L.E. v. Ramsey Board of Educ., 435 F.3d 384, 389 (3d Cir. 2006). Thus, the “[f]actual findings from the administrative proceeding are to be considered prima facie correct. If a reviewing court fails to adhere to them, it is obliged to explain why. The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities” S.H. v. State-Operated School Distr. of the City of Newark, 336 F.3d 260, 270 (3d Cir. 2003).

IV. ANALYSIS

The Robinsons would be entitled to reimbursement for Emily’s tuition at the Cambridge School only if (1) the IEP offered by the School District did not provide a FAPE⁵ and (2) the Cambridge School represented an appropriate educational program for Emily. Shore Regional High School Board fo Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004). As the party seeking relief, the Robinsons bear the burden of proof. Schaffer v. West, 126 S.Ct. 528, 537 (2005).

The Robinsons argue that the IEP was deficient because it failed adequately to address Emily’s dyslexia. However, the IEP’s effectiveness in treating Emily’s dyslexia is not the proper

⁵ As noted above, FAPE is the acronym for “Free Appropriate Public Education.”

criteria for determining whether it provides a FAPE. A diagnosis of dyslexia does not without more trigger the applicability of the IDEA. See Grant v. St. James Parish School Bd., 273 F.3d 1102 (5th Cir. 2001) (“The fact that Ashton was diagnosed with dyslexia is not sufficient in itself to qualify her under the IDEA.”). Rather, a cognitive disorder such as dyslexia qualifies a child for special education under the Act if and only if it impairs the child’s abilities in one or more of the following areas: (i) Oral expression. (ii) Listening comprehension; (iii) Written expression. (iv) Basic reading skill. (v) Reading Comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.” 34 CFR 300.541.

As noted above, Dr. King diagnosed Emily as having an impairment in only one of those categories: written expression. See School District Exh. 3. Thus, it was not Emily’s dyslexia which qualified her for special education under the Act; it was the fact that her dyslexia contributed to an impairment in the area of written expression. The point is important because it provides the criteria by which the IEP must be evaluated: whether the IEP provided a FAPE depends on the extent to which it helped Emily with her writing; thus, its effectiveness in addressing her dyslexia is relevant only insofar as that condition contributes to the impairment in written expression. See 20 U.S.C. § 1414(d) (providing that the IEP should seek to meet the “child’s needs that result from the child’s [qualifying] disability”). In short, the question before the Court is whether the May 23 IEP was an appropriate educational response to Emily’s “specific learning disability” in the area of written expression.

An IEP satisfies the FAPE requirement when it is “specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” Board of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982). “The education provided must ‘be sufficient to confer some educational benefit upon the handicapped child,’ although the state is not required to ‘maximize the potential of the handicapped children.’” T.R. v. Kingwood Twnshp, Board of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (quoting Rowley, 458 U.S. at 197 n. 21) (internal citations ommitted). An educational program which provides “merely more than a trivial educational benefit” is not sufficient. Ramsey, 435

F.3d at 390.

At the due process hearing, Dr. King maintained that the IEP was not appropriate for Emily's disability. Hearing Tr. at 895. He acknowledged that the IEP provided help with her writing, but argued that it was ultimately lacking because it failed to address the cause of her written expression problems: the Orthographic dyslexia from which she suffers. The School District's program, he contended, was a superficial fix that aimed only at the symptoms; the only way truly to remedy the disability in written expression would be to address the cause – Emily's dyslexia. See Hearing Tr. at 827, 895; School District Exh. 3 at 12.

To accomplish this, Dr. King testified, it was necessary to have Emily undergo an "intensive long-term program that's multi-sensory and systematically designed for this intervention." Hearing Tr. at 840. Because dyslexia is a "problem that's specifically related to brain functioning," he asserted, "unless the method [is] that intense and that specific, that consistent, that sequential, the children do not make progress." Id. at 868. Only such a program would enable Emily to overcome the phonological processing problems which ultimately lay at the root of her disability in written expression. The May 23 IEP the school had proposed did include certain components to help Emily with phonological processing, but it lacked the "intensity specificity, consistency, and stability over an extensive period of time that's require[d] to address the more serious issues that are part of the dyslexia[.]" Id. at 868. For that reason, Dr. King argued, the May 23 IEP was not appropriate for Emily, and her parents were justified in refusing to accept it.

The Hearing Officer did not agree with Dr. King's conclusions. He found that the May 23 IEP did provide a FAPE, despite its lack of a comprehensive phonics program designed to treat dyslexia. Hearing Decision at 14. The Court agrees.

Even if the Court were to fully credit Dr. King's testimony, it would establish nothing more than that in the long run, Emily's writing would best be served by one of the systematic interventions he endorsed. See Hearing Tr. at 887-88. But, as noted above, the IDEA does not require the School District to design a program that will maximize Emily's educational potential;

the FAPE standard is satisfied so long as the IEP provides more than merely a “trivial educational benefit.” Nowhere does Dr. King suggest that Emily would not have benefitted from the school’s IEP.

Moreover, there is ample evidence in the record that the May 23 IEP would have conferred a meaningful educational benefit. The program the School District developed for Emily was specifically tailored to her needs. It included most of the accommodations Dr. King had recommended in his Report, as well as the “Making Words” program, which was intended to improve Emily’s decoding skills. Most significantly, Emily’s scores on the standardized reading and writing assessments taken at the end of her second grade year reveal that the program in place (which the May 23 IEP would have continued) had yielded positive results. Emily’s writing skills tested “Proficient” in four of the five evaluation categories in which she was tested and the one score that fell below proficient was an improvement over her score from the fall before any intervention had taken place. These scores show that the specialized programming Emily received in the Second Grade improved her writing skills to the point where she was able to function at her grade level. That is unquestionably a “meaningful educational benefit.” Accordingly, the Court finds that Emily’s IEP for the Third Grade, which would have continued that successful programming, provided a FAPE.

V. CONCLUSION

The IDEA does not promise the best possible education; rather, its goal is to provide an appropriate education. The record contains substantial support for the Hearing Officer’s conclusion that the May 23 IEP, had it been implemented, would have met that goal. In short, the School District provided Emily with the education to which she was entitled under the Act and clearly is not required to pay her tuition at the Cambridge School. Accordingly, the Court will grant the School District’s Motion for Judgment on the Administrative Record. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EMILY ROBINSON, a minor child by	:	CIVIL ACTION
and through her parents MICHAEL AND	:	
DANA ROBINSON, <u>et al.</u>	:	NO. 05-1988
	:	
v.	:	
	:	
COUNCIL ROCK SCHOOL DISTRICT	:	

ORDER

AND NOW, this 12th day of July, 2006, upon consideration of the parties' cross-motions for Judgment on the Administrative Record (docket nos. 12 and 13) it is **ORDERED** that Plaintiffs' Motion is **DENIED** and that Defendant's Motion is **GRANTED**. Accordingly, the Clerk shall enter Judgment for Defendant and mark this case **CLOSED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.